

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
EMPLOYEE UD2122/2010
claimant
Against
EMPLOYER
respondent
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Ms J. Winters
Mr J. Flannery

heard this claim at Dublin on 12th March 2012
and 16th May 2012
and 9th July 2012
and 10th July 2012

Representation:

Claimant(s): Ms. Cathy Maguire BL instructed by Mr. Brian Gallagher, Gallagher Shatter,
Solicitors, 4 Upper Ely Place, Dublin 2

Respondent(s) :Mr. Tony Kerr BL instructed by the Chief State Solicitor's Office,
Osmond House, Little Ship Street, Dublin 8

The determination of the Tribunal was as follows:-

Respondent's Case

The Personnel Officer of the respondent company told the Tribunal that the purpose of a twelve month probationary period for a recruit prison officer was to give the opportunity to prove he/she could give service and is suitable for the position. The first nine weeks was an induction period and the recruit undergoes training. After nine weeks an assessment was completed and sent to HR and placed on the recruit's file. This report was checked by the HEO and if there was anything untoward on the report it was brought to her attention to establish if action was required.

If the recruit was absent due to illness during the first nine weeks of his probationary period HR issued a warning letter. Punctuality was of critical importance and if a recruit had a tendency

to be late this set off alarm bells. Prison officers were on duty 365 days a year twenty four hours a day. It was of paramount importance that prison officers attend on time as prisoners have to be released for meals. If a recruit is not going to be in work the governor on the day had to organise staff. If a prison officer was late taking up duty the assistant governor would consider the situation and may delay the prison officer going off duty. If a prison officer were to leave their post there was a consequence for the governor.

During the first two weeks of training a presentation was made to each group regarding terms and conditions of employment including punctuality and civil service regulations. The prison officer was covered by prison rules. In the first two weeks the assistant governor and the attendees sign in to indicate that they have attended. HR always attends on the last two weeks. HR delivers a presentation, focuses on sick leave, and goes through the Payment of Wages Act and all matters relating to terms and conditions of employment. This is done for every single group.

The employment assistance officer (EAO) gives a presentation. Three full time employment assistance officers are supported by other staff. The employment assistance officers provide support regarding work related difficulties and give advice on how to resolve a situation. The respondent has a psychologist service if the EAO feels this service can help. Prison Officers may need counselling. The EAO contacts the personnel officer if an officer requests a temporary transfer. EAO offers welfare support and this service is confidential. The respondent would not be made aware of the nature of the discussions between the employee and the EAO as these are confidential. After nine weeks a probationary report is furnished and a recruit is assigned to a prison and engages with the training centre. After the probationary period of one year is completed a recruit completes a two year course in custodial care in conjunction with IT Sligo. Then a six month probationary report is required by the governor and it is sent to HR and the HEO. Another probation report is completed after ten months

HR is informed of the recruit's progress and if the recruit is suitable for a position with the respondent. On completion of the probationary report the governor is asked if the recruit should be made permanent. The consequences of poor attendance are looked at. If a prison officer did not report for work this could be a risk for the prison. There was a human rights issue as a prisoner may not be released from their cell and the resources workshop could be closed. This was a very difficult dilemma. If there was a major deterioration in an employee's attendance the reasons for it were looked into and these were monitored very closely in HR. If a recruit had a block of sick leave after ten months alarm bells would ring. If there is a difficulty a submission was sent to the director general of the prison service either granting an extension or termination.

A one year probationary contract was introduced in 2007 and prior to that the probationary period was two years. Each case was taken case by case and the respondent looked at the circumstances. Circumstances could be excessive and a process was followed. If a recruit prison officer requested a transfer an application would be made to the governor and the governor would send an application to HR. A transfer list was retained by HR and prison officers were placed in order of seniority. When a vacancy arose the most senior person on the list was facilitated. A temporary transfer system had a different procedure and this had to be for exceptional and family reasons and had to go to the governor. This has to come through the EAO. A temporary transfer is for humanitarian reasons. If you are assigned to a prison in Dublin an officer can submit an application for a transfer and await their turn. There is a long wait on the transfer list and it takes years to be assigned to a prison in the country. This is

made clear during training. After training is completed in Portlaoise an officer could be assigned to a prison in Dublin. Management have discretion to move officers should the need arise and an officer could be in Cloverhill for two to three months.

All circumstances are taken into account when assessing the sick leave record of the officers. She looked at the sick leave record during the probationary period and after ten to twelve months. Prison officers work civil service hours but attendance is different than the general service grade. Prison officers can work longer hours and could be rostered to work ten, eleven, twelve and thirteen hour days. One day's absence for a prison officer could amount to two days.

The onus is on the individual to report for work. The respondent had discretion regarding sick leave, it looked at the nature of the absence and it was under no obligation to discount. If an officer applied for promotion and if there was a significant improvement in the last two years one could establish that the individual has improved. If an officer had a long absence circa 28 days he was referred to the CMO for advice. If there was a grave concern regarding one and two day absences it was referred to the CMO.

A recruit's probation may be extended to allow the recruit show that he can give effective service. If the Director General granted six months there could be a six to twelve month extension. It was very rare that a further extension period was granted beyond two years.

If an officer is absent a medical certificate must be provided in one week blocks. If ill on Friday and Monday the Saturday and Sunday were included. If an officer is absent on Monday and not in work on Tuesday/Wednesday and he is ill on Thursday he must provide a medical certificate.

The code that the respondent now has supersedes the previous code and she was not familiar with the previous disciplinary code. If a prison officer came in to work he would get fifteen minutes grace and he would not get an infringement. When a new recruit started the first twelve months was a probationary period. If a recruit is satisfactory in the second and third year they will go on to become a prison officer. During the twelve months they are regarded as prison officers.

Negotiations took place in 2005 with the staff side. Grace periods were reintroduced to the prison service of forty five minutes a day. An officer could report for duty and would be given ten minutes grace and would not get an infringement. After that period he was permitted to

The decision to terminate the claimant's employment was made in August 2010. If she felt that the absence was due to an underlying medical condition she would refer the case to the CMO. If there was an absence in the early stages of probation the respondent sent a letter to the Governor which was relayed to the personnel officer.

The claimant's punctuality was a cause of concern in the first six months of his probation. He had a total of eight lates which totalled 4 hours 35 minutes and this was of great concern to her.

The chief officer spoke to the claimant regarding the issues over lates. The claimant was placed on all the transfer lists and this was based on seniority, the waiting time is excessive, in Limerick it is twelve years and in Portlaoise eight years. Discussions would have taken place to transfer employees for exceptional operational reasons. An employee could apply for Force

Majeure leave

In a memo from the HEO, J MacC dated 18th February 2010 to the Director General and the Personnel Officer it outlined that on the 16th June 2009 a submission was made for an extension of the claimant's probation following receipt of his ten month probation report which showed a total of 3 absences of 12 sick days and 8 reckonable lates for the period. The claimant was advised on the 16th June 2009 that that his period of probation was being extended for a further six months. On the 17th June 2009 in a note to the Director General she recommended that the claimant's probation be extended by six months. Since the 26th June 2009 the claimant had a further 5 absences of 10 sick days. The claimant availed of unauthorised Force Majeure leave without pay for one day on the 28th September 2009

In a memo to the Secretary General on the 19th February 2010 she made a recommendation that the claimant be afforded a further final extension of 6 months from the 28th February 2010. She could have recommended dismissal. The claimant's punctuality was of grave concern to her. She had concerns as there was no significant improvement in the claimant's attendance up to the 13th July 2010. The claimant could not give the service which was required by a prison officer.

In a memo to the Director General, Secretary General and the witness HRD recommended that the claimant's employment be terminated as his punctuality had not improved. In a note attached to this memo dated the 18th August 2010 the witness agreed with the recommendation to terminate the contract of employment. In a handwritten note dated the 19th August 2010 the Director General agreed with the recommendation. The claimant had been offered two extensions of his probationary period. The claimant made a representation as to why termination should not take place and the EAO wrote on his behalf as to why his contract should not be terminated. On the 23rd August 2010 the claimant highlighted that he had a throat infection and she took that into consideration when making a decision to grant him an extension. There was nothing that would justify a further extension. She told him that if there was no improvement his file would be sent to the secretary general.

In a large prison there is a larger cohort of staff and there may have been more scope for the claimant. She checked to establish if there was a pattern of non-attendance

In cross examination she stated that over 2,500 had availed of Force Majeure in the prison service and this was not managed effectively. The claimant was told that Force Majeure Leave without pay was being granted in respect of the 28th September 2009. The claimant did not get into trouble regarding FM leave. When put to her if the respondent did not believe he was sick when he furnished medical certificates she replied not as blandly as that. When she was asked if she could have taken steps to establish if they were genuine medical certificates she replied that the issues were that the claimant was on extended probation for non-attendance due to illness. This was when you should be at your best and establish if suitable for the position of prison officer.

The Guidelines on Probation from the Department of Finance did not refer to outside limits regarding excessive absenteeism. Absences were recorded as established by the Department Of Finance. The general service grade was vastly different than that of prison officer.

After a nine week induction if the claimant had an issue she would have expected him to write

to her. She looked at non-attendance and hours worked. She looked at the loss of hours and it amounted to over thirty three days. The sick leave element was a major concern for the respondent. At induction HR made it clear that sick leave was not tolerated. She looked at the hours also and the consequences of this and she did not tell the claimant she was doing this exercise. Sick leave was of major concern for the respondent and excessive time was lost to the prison service. She undertook this exercise around the time the claimant was dismissed. During the probationary period a recruit has to prove he can do the job. The claimant was warned if there was no improvement in his attendance a file would be sent to the Secretary General. There was no appeal process in place.

She had not spoken to Governor K previously and he was more senior than Governor W. She wanted to ensure that the secretary general was aware of the discussions she had. She would be very surprised if Governor O S did not discuss the claimant's punctuality with him as this was critical in all positions in the prison. In August 2010 a recommendation issued that the claimant should receive a further extension. She would take this opinion into account and would consider the further consequences on the seriousness of poor attendance. If someone was given power and authority and on probation it did not augur well.

Governor K was absent on sick leave during this time and that is why it went to Governor W. The claimant's work performance was very good and she had to take everything into account.

It was made very clear that his poor punctuality was taken very seriously. Recruit prison officers have to prove that they can attend and be punctual.

The claimant received an increment the first year of his employment. When asked if the increments applied to all prison officers she replied that there were on-going discussions regarding Industrial Relations. She agreed that Finance circular 34/76 which outlined clearance of candidates for promotion or establishment: sick absences and health considerations was relevant. She took into consideration the rates of absences and if an officer was hospitalised she would have regard to that. The claimant was given an extension of his probation. The opportunity was offered to the claimant to prove that he could give service. When she was asked if the claimant never exceeded the limit she replied it was up to management to make the decision and consider a prison officer suitable for employment.

Recruit prison officers were considered for appointment as a prison officer after satisfactory completion of the third year as a recruit prison officer. The recruit prison officers were closely monitored after the first year. In 2007 a one year probationary period was introduced. She recommended two extensions for the claimant. Discretion was not exercised in his favour as his absences were excessive. She recommended termination as she did not think the claimant was someone who could be depended on. It was up to management to make the decision. If someone could not leave home on time to get to work that was very serious. Probation was the full package. The secretary general may think otherwise if she made a recommendation. She could not take the claimant's absence and his tardiness in isolation. The claimant did not take the warnings seriously and was on extended probation.

In re-examination she stated that she would have taken into account the claimant's tonsillitis and torn stitch. An officer could not take sick leave when a member of their family was ill. Force Majeure leave was unexpected and meant you could not be done without.

The former director of operations of the respondent told the Tribunal that punctuality was of paramount importance in the prison as was security and safety. It was not like a factory. If

prison officers do not report for work people are in danger. If a prison officer is a half hour late a governor will make a decision and it does diminish the security of the prison. If prison officers do not arrive on time it leaves employees in a precarious position. In the special security unit visitors have to go through a metal detector to establish if contraband is being brought into the prison. There are three units which are part of one unit. In the operational support group there is security screening similar to the airport. The claimant was assigned to the operational security unit. This was a three person unit and all staff were searched from 7a.m. onwards. Up to 70% of staff reported for work between 7.00a.m and 7.45 am. It is very important that staff report for work on time. No one is allowed into the prison without being searched. A staff member watches the monitor and visitors/staff may be asked to take off their shoes. The OSG unit is a stand-alone unit and the respondent relied on the prison officer to provide support.

He met the claimant many times when he was acting director general. He recommended that the claimant's employment be terminated. He established that the claimant had been given a number of chances to improve his attendance but this did not happen. There was a pattern in the claimant's absences. He spoke to the Governor and other personnel regarding this and he did not go into detail. It was very rare that a recruit was dismissed during probation. He found that the claimant's interaction with people was very good and he was very good at his job. The claimant put the security of the prison at risk on twenty three occasions.

Prisoners assigned to security received training in the use of equipment. A recruit was provided with nine weeks training. He was aware that the claimant applied for a transfer to the new OSG unit. The claimant was placed on the transfer list. The witness saw the full transfer list which was maintained by HR. Due to the extensive transfer lists it could take up to ten to twelve years to be transferred from Dublin to the country. This usually occurs if an officer in one of the country prisons retires. It was in the respondent's interest to facilitate staff.

In cross examination he stated that he had the claimant's file. He based his recommendation on all the documents and the enclosures in the file. He established if there were patterns on particular days. In correspondence to the claimant patterns regarding his absences were not mentioned. The claimant was absent on five Fridays, three Mondays and on one Saturday. The whole basis of his recommendation was that the claimant was not giving dependable service. The claimant was frequently absent on twenty three different occasions.

If the claimant had less lates that was an improvement. He did not find that the claimant had improved enough. In the last six months of the claimant's employment he had three absences and three lates and the claimant was not giving full service.

He reiterated that the claimant did not report for work on twenty three occasions, these were attributed to illness and lates. He looked at lates over a two year period. He looked at a six month assessment. The penalty was not about lates, it was about dependable service.

The security of the prison was in danger if employees do not undertake their job properly. If employees do not report for work it had a direct effect on the operation of the prison. Employees and visitors have to go through a search procedure before clocking in. It was crucial that the officer be in work on time. The security of the prison was diminished by the claimant not being present. The respondent could not roster for officers who did not report for work unless they telephoned prior to duty. When put to him that the claimant did not see a minute from Governor W regarding why the claimant should not be recommended for

confirmation of his appointment he replied that the claimant was a member of the security screening unit and was aware of the statement. He did not know the statistics regarding recruit prison officers being granted an extension of probation beyond two years.

He went through the claimant's file and he felt that the claimant could not continue working with the respondent. He felt that the claimant was given every opportunity.

In answer to questions from the Tribunal when asked if there was any alternative to dismissal he replied that he knew the claimant, he had a duty of service to the prison service and he felt it was best for the claimant to go. The respondent endeavoured to retain employees and this is the reason they have to serve a probationary period.

The former secretary general SA told the Tribunal he made a decision regarding the claimant in August 2010. The purpose of probation was to establish if an officer was a competent performer. He considered the options and read the reports. It was not the respondent's option to make the claimant permanent. The claimant was a recruit prison officer and deducting money from him was not an option. Under law his agreement was essential and he had the papers in front of him. It was clear that the claimant would not be able to be a prison officer and he made the decision on the 19th August 2010.

He was mandated to consider the appeal and the claimant had asked that he reconsider the decision. He did not think it appropriate, he was asked to make the decision and he made it. He took the view when the claimant took on the job that it was up to him to make his own travel arrangements. The claimant had ample time to obtain accommodation and he had to judge the claimant by his performance. People make choices. He would have considered how important time keeping was. He was persuaded by the realistic prospect of long term improvement.

The respondent did not give employees repeated extensions of probation. He could not recall an occasion when an officer was given an extension beyond two years. He was presented with all the available records and reports. He felt that every opportunity was given to the claimant. He did not discuss the claimant's letter dated 23rd August 2010 addressed to the Governor in which the claimant wished to appeal the decision to terminate his contract. He felt that the claimant was given every chance to improve.

In cross examination he said he was not vastly familiar with the Sick Leave Circular. He would have relied on the documents before him. He was not aware of the limits of Circular 34/76. He would have seen a reference to hours and the claimant had a pattern of absences and attendance.

Employees who have a poor probationary period are much worse when made permanent. He was not aware of the limit regarding late attendance. There was very little in the way of sanction for late attendance. He was aware that the Guidelines regarding probation were available in HR. The claimant's sick leave record was not satisfactory. The attendance records were not put before him. It was not necessary for him to know the procedure; this was the remit of HR. There was an opportunity for the claimant to make an argument, this was made and was not particularly persuasive.

The first decision was taken by him on the 19th August 2010 regarding terminating the claimant's employment and he made the decision on 26th August 2010. He was capable of changing his mind about the decision between the 19th August and the 26th August but the

documentation before him was not sufficient to make him change his mind. He was the best placed person to speculate and if he reached a decision before the 19th August 2010 he would not have changed his mind. He did not know why he did not receive a letter dated 23rd July 2010 addressed to the governor from the claimant in which the claimant outlined the reasons for appealing his decision regarding his probation.

The claimant's attendance was in the spotlight and he had a decision to make. The period of probation was formerly two years and this is a very long time. A decision should be made sooner than two years. A recruit could not contribute as a member of the respondent if they did not complete satisfactory probation. He took the view that the claimant's service was unsatisfactory. He made the judgment call. The purpose of probation was to establish whether a recruit could continue in employment or not.

In answer to questions from the Tribunal he stated that in the early years a recruit could not have as many warnings as an experienced officer. The respondent had a range of options open to it; it could terminate and offer a further extension of six months. On analysis he did not feel it appropriate to offer an extension. When he was asked if the claimant had another option to appeal it he said the Minister had delegated powers to the Secretary General

Claimant's Case

The claimant outlined in detail to the Tribunal his extensive work experience prior to commencing employment with the respondent in August 2008. For the first twelve months he undertook work in different units of the prison. He applied for a transfer to the OSG Unit as he would have seven days on and seven days off. He commenced work in the OSG unit in spring 2009 and he enjoyed the work as the duties were varied. He had sick absences due to tonsillitis and he did not like missing work. The doctor recommended that he have a tonsillectomy and he booked the operation while he was on annual leave. Following the surgery he ripped a stitch and he has not had a sore throat since.

On one occasion while he was travelling to work he was involved in an accident. He had to take eleven days sick leave due to his tonsils and two days as a result of the accident. He obtained accommodation in Dublin after he was given a first extension of his probation. He applied for a transfer and anyone not from Dublin applied for a transfer. He was late for work on six occasions.

He would like to return to work. He has not been ill since he left the respondent. He tried to obtain alternative employment. He has obtained a few weeks work with a local company.

In cross examination he stated that as far as he could recall he had certified sick leave for six days during a nine week period. He had a number of lates due to the commute to his workplace. The chief officer told him to keep an eye on his time keeping. He did not understand this to be a verbal warning. He was spoken to regarding his absences due to illness. He received a letter dated 23rd April 2009 regarding his probation. It outlined that since the commencement of his probation the claimant had incurred 3 absences on sick leave of 12 days and 8 reckonable lates with a total loss of time of 4 hours and 35 minutes. The payment of future increments, suitability for promotion and his retention in employment was contingent on his ability to provide regular service. The claimant agreed that if he was late that someone had to take his place and there are contingency plans in place.

He was upset on receiving a memo dated 26th June 2009. It was acknowledged that he had improved his attendance and had not incurred any further absences on sick leave or lates since his six month probation report. His probation period was extended by 6 months up to the 28th February 2010. In his Probation Report dated 12th November 2009 his total loss of time was 9 hours and 50 minutes Governor K spoke to the claimant about his lates but he did not perceive this as a warning. The claimant felt that his punctuality had improved in the last twelve months and he had 8 reckonable lates in the last twelve months.

He received a memo from the Personnel Officer on the 25th February 2010 regarding further lates and absences due to sick leave since June 2009 and his probation was extended by a further 6 months. It was outlined to him that if during his extended probationary period that his attendance/punctuality gave cause for concern his file would be immediately submitted to the Secretary General with a recommendation for dismissal. Governor K spoke to him about this matter. A 22 month report dated the 13th July 2010 indicated that the claimant had further lates. He had a meeting with Governor O S, this meeting was about sick leave, he was never told to keep lates to a minimum. He was told to report for work on time.

The claimant spoke to the employee assistance officer but he did not instruct him to compile a letter to the Secretary General. He had to take time off work due to his children's illness and he obtained a doctor's certificate to cover this. He agreed that 70% of his sick leave was Fridays and Mondays inclusive. He had no explanation for this.

If a colleague was late reporting for work he would remain beside the X-ray machine and there would be a delay of thirty seconds. If he found contraband he would contact the respondent. After he was dismissed he undertook a training course. He sought employment on the FAS website and the local newspapers. If he obtained employment in Dublin he would consider relocating.

In re-examination he stated that when his children were ill he could not leave them on their own. Due to the nature of their illness the children could not remain with their mother who was pregnant at the time. He was never asked to attend the Chief Medical Officer regarding his absences.

SD from the IPOA told the Tribunal that he had represented prison officers at local and national level. In 2005 and 2007 he led negotiations on behalf of officers. The OSG is a stand-alone unit and has sufficient resources to cover absences. The claimant was one of thirty officers in a unit and the unit operated in the last five years.

He could not recall if the claimant was dismissed for his lates over nine months. He was of the opinion that this did not warrant dismissal. The probation period was previously two years and officers were granted an extension of probation beyond two years.

In cross examination he agreed that the claimant's probation was extended on two occasions. Management have the ability to call on staff at short notice. The best practice in the OSG Unit was that one person scan the X-ray machine and one person works on the metal detector.

In answer to questions from the Tribunal he stated that the union would advise officers to make submissions. Officers would go to the union regarding sick leave. Many recruits were given extensions of probation. He was aware that the claimant had made a submission. In other cases absences would be discounted. When asked if there was no direct representation from the

IPOA during this time he replied that efforts were made late in the day. The claimant did not get the chance to appeal. The time span between the 19th and 25th August 2010 was very short. The success rate on appeal was 95% or higher if an officer was provided with a chance to prove themselves.

Determination

The Tribunal finds a number of flaws in the process adopted by the respondent namely:-

Failure to advise the claimant of his entitlement to make a submission in his defence before the decision was made to dismiss him.

If the relevant discounts to his sick leave/absenteeism had been made he would have been under the limits as specified in the sick leave circular. While it is acknowledged by the Tribunal the limits referred to in the circular are not to be considered as targets, the reality is that the phrasing in the document could lead an employee to believe that such levels of absenteeism /lates would not attract an appropriate sanction

All the relevant documentation did not reach the Secretary General before he made his decision.

On the other hand the claimant was given two extensions to his probationary period. He was given clear warnings with regard to his time keeping and sick leave and the need for improvement of same and he appeared to ignore these in that there was no significant improvement. However the Tribunal finds that technically that the dismissal was unfair but the claimant contributed substantially to his dismissal.

In the circumstances the Tribunal awards the claimant compensation of €10,000.00 under the Unfair Dismissals Acts, 1977 to 2007

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

